case made out on the basis of mere negligence. It is quite unlikely that the rider could secure the same amount of transportation from a railroad, taxi, or bus company for the price represented by the gasoline purchase. Furthermore, it is doubtful, from a practical standpoint, that the purchase was intended as payment, and even if it were, it is even more doubtful that it was accepted as such. Both tender and acceptance are necessary for payment. *Haas* v. *Bates*, 150 Ore 592, 47 Pac. (2nd) 243 (1935). On this view of the situation there is substantial justification for the position taken in the principal case on the facts before the court.

A closer question is presented when a purchase of this kind is intended and received as payment. An Ohio Appellate Court has held that this constitutes sufficient consideration to take the case out of the statute. *Beer* v. *Beer, supra.* Yet in spite of the fact that a contract has been entered into, the act of the driver is influenced more by a spirit of hospitality than a desire for gain, and it would not be surprising if other courts in such a situation would treat the rider as a guest rather than a passenger for hire.

ROBIN W. LETT

LABOR LAW

THE STATUS OF THE STRIKE FOR A CLOSED SHOP*

A majority of plaintiff's driver salesmen, members of a Drivers' Union Local, after unsuccessfully requesting their employer to hire only union labor, went out on strike. The sole issue involved was the right to strike for a closed shop. Plaintiff asked the court for a permanent injunction against the strikers. Defendant conceded that all intimidation and violence should be enjoined but contended that the injunction should not extend to peaceful picketing.

Held, that all striking activities including peaceful picketing should be permanently enjoined. *Drake Bakeries, Inc.* v. *Bowles et al.*, 31 Ohio N.P. (N.S.) 425 (Ohio L. Rep. March 12, 1934).

* The following note was previously published in the *Ohio Bar* for May 7, 1934. A recheck by Jack Day indicates that the Ohio courts have not since that date passed upon this subject matter. While the invalidation of the N.I.R.A. has disposed of the principal case discussed in the note, the issue has taken on a new timeliness in inter-state industry in view of the similar wording in Sec. 7 of the National Labor Relations Act (29 U.S.C. 157) and the added provision in the same act expressly recognizing a closed shop agreement with labor organizations "not established, maintained, or assisted by any unfair labor practice." (29 U.S.C. 158(3)). Furthermore, the failure of passage in the recent Ohio Legislature of Am. H.B. 16, restricting jurisdiction for the issuance of injunctions in labor disputes, has left the question of the right to enjoin a strike for a closed shop in intra-state industry just as it was when this note was originally written.—Ed.

The main issue in this case is whether or not at the present time the strike for the closed shop is legal in Ohio.

LaFrance Co. v. *Electrical Workers*, 108 Ohio St. 61 (1923), is the sole Ohio Supreme Court case in point. The court by this decision definitely upheld the right of strike for the purpose of the closed shop. In general terms this holding means that the use of the economic weapon was sanctioned in Ohio as long as the objective of the strike was lawful, and as long as the means of carrying forward the strike were free from violence and intimidation.

If the principal case had been decided on Ohio precedent, clearly peaceful picketing for the purpose of obtaining a closed shop would not have been enjoined. The court, however, omits any consideration of the *LaFrance* case. It bases its decision squarely on its interpretation of Sections 7a and 5a of the National Industrial Recovery Act. 15 U.S. C.A. No. 701-712.

These sections follow:

Section 7a: "Every code of fair competition, agreement, and license, approved, prescribed or issued under this title shall contain the following conditions: (1) that employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President."

Section 5a: "Nothing in this Act and no regulation thereunder, shall prevent an individual from pursuing the vocation of manual labor and selling or trading the products thereof. * * *"

The court's position is this: These two sections have in effect made closed shop agreements illegal. This for two reasons. In the first place, such agreements would force employers to say to individuals, "You must be a member of the union and be represented by their delegates." This, in the court's mind, would invade the right of employees to have representation of their own choosing. In the second place, these agreements would amount to preventing men from pursuing the vocation of manual labor. Therefore, with the objective of the strike illegalized, the

strike becomes an unlawful combination without justification. Hence peaceful picketing because of its wrongful purpose becomes illegal and enjoinable.

The court quotes two excerpts from public statements of Administrator Johnson and General Counsel Richberg. These statements and others which these two gentlemen have made in their interpretation of Section 7a support the court's interpretation. For they have said at various times that the selection of majority representatives does not restrict or qualify in any way the right of minority groups of employees or of individual employees to deal with their employer.

It would appear, however, that section 7a permits of a second interpretation—an interpretation which does not illegalize closed shops.

This second approach proceeds on the basis that freedom of choice in the selection of representatives is not given to an individual acting alone but only to employees composing an organized group. An individual does not have any collective bargaining rights which can be interfered with until as a member of a group his freedom of selection is invaded. Or in the facts of the principal case since the other driver salesmen of the plaintiff were not organized, Section 7a did not extend any new rights to them. Hence these other employees do not by this section receive any right of representation of their own choosing which a closed shop agreement would invade.

President Roosevelt's public statement at the settlement of the auto industry labor dispute on March 26th suggests this second interpretation.

"Reduced to plain language Section 7a of N.I.R.A. means (a) Employees have the right to organize into a group or groups. (b) When such group or groups are organized they can choose representatives by free choice and such representative must be received collectively and thereby seek to straighten out disputes and improve conditions of employment. (c) Discrimination against employees because of their labor affiliations or for any other unfair or unjust reason is barred."

Furthermore, Section 5a does not prohibit a closed shop agreement. It says "nothing in this act shall prevent pursuing the vocation of manual labor." But compulsory union membership does not prevent, it merely qualifies employment.

There are a number of arguments in support of this second interpretation. The first arises from a consideration of the legislative intent lying behind these two sections.

The *Congressional Record* for June 8th (pages 5241, 5279, and 5290, Vol. 77, Part 6) seems to include the only references to the intent of these sections made on the floors of the two houses. The latter part

of Section 5a was written into the N.I.R.A. on the floor of the Senate as an amendment by Senator Long. Previous to its introduction Senator Long had said, "We are going to get that regulation down to the point that every little man that takes his water jug and ax across his back and goes into the woods to hack cross ties is going to have to comply with some rules and regulations and stand ready to have his license revoked for not complying with the rules and regulations that are issued governing the length and width and breadth and thickness and quantity of cross ties. * * * And I will ask only one thing further. I will ask that the Senator put in further that the President has not power to revoke a laboring man's right to go ahead and pursue his vocation."

From Senator Long's statements it would appear that Section 5a has no applicability to the rights of the driver salesmen in the principal case.

As to Section 7a the *Record* reveals that a proviso suggested by the committee having the Bill in charge (to the effect that nothing in this section shall compel the changing of existing satisfactory relations between employers and employees) had passed the Senate. Senator Norris on the next day moved to strike this proviso from the Act. His accompanying words (which were chiefly instrumental in accomplishing this) throws some light on Section 7a.

"This particular provision in the bill—Section 7, reestablishes almost in identical language of that Bill (Norris-LaGuardia anti-injunction act 29 U.S.C.A. No. 101-115) the right of employees to organize in unions of their own * * *. I think the proviso a direct blow at organized labor * * *. Some honest people believe that there ought to be no such thing as organized labor. If their view be the correct one then we ought to strike out this whole section; but if we are proceeding on modern theory * * * then we ought to provide that the laboring men shall be permitted to organize in their own way without coercion, without any influence from their direct employers and that they shall be permitted to select representatives of their own choice to represent them in controversies which they must continually meet with organized wealth."

Senator Norris' words seem to indicate that Congress intended to consolidate in a few words the right of labor to organize collectively without interference. It was apparently injected into the act to give congressional sanction to collective bargaining. In so many words Senator Norris states that this right is to provide them equal bargaining power with organized wealth. It would seem that Congress in sanctioning collective bargaining impliedly sanctioned the concrete methods

which are drawn after it to make it effective. The logical sequel to collective bargaining is the existence of a completely unionized shop. It seems unlikely that Congress in this avowed attempt to help the cause of organized labor would have given this right without giving, by implication, the necessary collateral rights to make the goal of equal bargaining power a reality.

Senator Wagner's statement at the introduction of his Labor Disputes Bill on February 28th bears out this contention. "The new legislation which I am proposing does not dictate any policy as to the closed union shop. That is the problem which labor must work out for itself. But the Bill does make it clear that Section 7a was not intended to ban the closed union shop and that Congress never intended to place employees in a worse condition than they were before the Recovery Act was passed."

The second argument is the content of the executive order of February 1st (*Federal Trade & Industry*, Vol. 1, N.I.R.A., No. 5702) and the Denver Tramway ruling of the National Labor Board decided in harmony with this order. (*Federal Trade & Industry*, Vol. 1, Current Matter, No. 8055).

By this order elections of representatives are to be held whenever a substantial number request such an election. After the election is held the Board shall publish the names of those elected who are "thereby designated to represent all the employees eligible to participate in such an election for the purpose of collective bargaining or other mutual aid or protection in relations with their employer." The purpose of this order was to meet the practical problem of an employer faced with a number of factions each claiming the right to represent all his employees. This executive order was issued to lay down a procedure for carrying 7a into effect. But it was issued within the limitations of Section 7a. The result of this election procedure is a situation which the court in the principal case declares to be illegal. For this order definitely empowers the selected representatives of the majority to represent all those eligible to vote. Or in other words, this order gives clear sanction to a saddling of the majority representation not only on unaffiliated employees but also on minority groups. It seems then that on this score Section 7a should be interpreted to permit the closed shop.

The third argument centers around the second subsection of 7a. This read in its first draft, "that no employee or anyone seeking employment shall be required as a condition of employment to join any labor organization." But President Green of the American Federation of Labor testifying before the House Committee on Ways and Means

(H. R. 5664—73rd Congress, 1st Session 118) suggested the substitution of the words *company union* "to make clear and definite the real meaning and purpose of this part of the act." To designate that membership in a company union is prohibited as a condition of employment seems clearly to permit membership in an outside labor organization as a condition of employment. Subsection 1 of 7a which contains the controversial points on freedom of choice and interference seemingly should be qualified in light of the positive language of subsection 2 which has just been quoted.

The fourth argument concerns Section 7c. This section follows: "The President shall so far as practicable afford every opportunity to employers and employees in any trade or industry or subdivision thereof —to establish by mutual agreement the standards as to maximum hours —and such other conditions of employment as may be necessary in such trade or industry or subdivision thereof to effectuate the policy of this title—and the standards established in such agreements when approved by the President shall have the same effect as a code of fair competition approved by the President."

Suppose that seventy per cent of the group draw up a certain agreement laying down hours of employment, rules of work, and amount of wages. This section seems to give the President the authority to facilitate the signing of such agreement by the representatives of the seventy per cent with the employer. And it furthermore definitely says that these agreements shall have the same effect as a code of fair competition. The National Industrial Recovery Act gives the government power to enforce the imposition of a code on a minority of employers (Sec. 3a). By extending the same effect to agreements of employment it would appear that the rights of the individual employees must similarly give way to the rights of the majority. Once more it seems that subsection 7a (1) must be construed in the light of a following section.

The final argument arises from a projection of the cases decided since the coming of Section 7a against the background of the law as it existed previously in those same states.

In New Jersey we find that the chancery courts quite generally before the N.R.A. held that the strike for the closed shop was outside the "allowable area of economic conflict." It is unnecessary to state their reasons. Typical of this approach is *Gevas* v. *Greek Restaurant Workers Club*, 99 N.J. Eq. 770 (1926).

In the light of this position it is not hard to understand *Bayonne Textile Corp.* v. *American Federation of Silk Workers*, 114 N.J. Eq. 307, 168 Atl. 799 (1933)[1]; and *Lichtman & Sons* v. *Leather Work-*

[1] This case was later reversed and the injunction modified to apply to intimidation only. 115 N.J. Eq. 504, 172 Atl. 551 (1934).

ers, 169 Atl. 498 (N.J. Eq.) (1933). These later cases seem to stress mainly the illegality of the union's attempts to gain a labor monopoly for their particular union. Since Section 7a does not in express language permit the closed shop it is not difficult to understand why the New Jersey Courts have maintained their hostility toward the closed shop.

On the other hand *Fryns* v. *Fair Lawn Fur Dressing Co.*, 168 Atl. 862 (N.J. Eq.) (1933) includes some dicta which one finds difficult to square with these other post N.I.R.A. cases in New Jersey. "* * * but if they are not organized and in fact indifferent as to how they shall be organized or the enterprise is just starting then the employer may choose his union and require all his men to join it."

The decisions in the New York Court of Appeals had consistently upheld the right to strike for a closed shop previous to the N.I.R.A. *J. H. & S. Theatres* v. *Fay*, 260 N.Y. 315 (1932); *Stilwell Theatre, Inc.* v. *Kaplan*, 259 N.Y. 405 (1932); *Exchange Bakery* v. *Rifkin*, 245 N.Y. 260 (1927). The only two New York cases in point since the N.I.R.A. have stated that the provisions of this act have made no change in the law as the Court of Appeals has enunciated it. *Rosenthaler Etlinger Co.* v. *Schossberg et al.*, 266 N.Y.S. 762 (1933); *Buckingham Cafeteria, Inc.* v. *Meservich*, S.C.N.Y. *Federal Trade and Industry*, Vol. 1, Current Matter, No. 8014 (1933).

No cases on this issue were discovered in Wisconsin previous to the N.I.R.A., but since then a circuit court in Wisconsin in *Federation of Labor* v. *Simplex Shoe Mfg. Co.* (C.C. Wis., Oct. 13, 1933) U. S. *Law Week*, October 31, 1933, index p. 137, has inferentially upheld the closed shop as legal under Section 7a, for it granted an injunction to the Wisconsin Federation of Labor against the company's interference with their program of plant unionization. This survey of the cases in point suggest the Janus-headed character of Section 7a. With its words lacking precision as to the closed shop, legality or illegality will seemingly be read in or denied on the basis of the precedent of the court.

The New Jersey courts have traditionally opposed the closed shop. It is easy to understand, therefore, their decisions since N.I.R.A., which have molded the equivocal language of Section 7a to coincide with their previous decisions. The New York courts, on the other hand, have established firmly the legality of the closed shop. It is just as easy to appreciate their reading Section 7a so as to uphold their former position.

The court in the principal case, as a result of *LaFrance Co.* v. *Electrical Workers, supra*, was faced with the same tradition as the New York courts. It would seem therefore that like the New York courts it should have interpreted Section 7a so as to perpetuate the legality of a

strike for a closed shop. Or in other words even after the advent of N.I.R.A. and its much publicized Section 7a, a strike for a closed shop should continue to be legal in Ohio. WILLIAM K. THOMAS

USE OF THE INJUNCTION TO PREVENT BREACH OF CONTRACT

The Hamilton Tailoring Company, of Cincinnati, Ohio, is a corporation employing about two hundred and fifty employees, engaged in the manufacture of clothing. Shortly after the N.I.R.A. was invalidated the employees evinced dissatisfaction with their wages and working conditions. While a strike was imminent the company presented to the employees a "contract of employment" which substantially all of them were induced to sign. No agreement on the question of hours and wages could be reached between the employer and the employees and on October 2, 1935, the members of the Amalgamated Clothing Workers Union within the shop, numbering about one hundred in all, voted to strike. The company filed a petition in the Common Pleas Court of Hamilton County for an injunction prohibiting the defendant union from "doing any act calculated to cause any employee to breach his contract of employment" and for other similar relief. The court denied the injunction on the grounds that the defendants were engaged in a legal strike and that the employment contract was void for want of mutuality in that during the first six months of its duration the employer had the right to terminate the same while an equivalent right was not vested in the employee. *Hamilton Tailoring Company* v. *Cincinnati Joint Board of Amalgamated Clothing Workers of America, et al.*, 4 Ohio Op. 295 (1936).

After this opinion was released but before the making of the journal entry the company drew up other contracts with its employees abrogating the original ones and attempting to meet the objection of the trial court by giving either party the right to terminate the agreement on fifteen days' notice. The case was then taken on appeal to the Appellate Court of the First District where the plaintiff company was permitted over objection to file supplemental petitions setting forth the new contract and alleging that the defendants had instituted a secondary boycott against the plaintiff subsequent to the filing of the original petition in the lower court. The Appellate Court reversed the holding of the trial court and enjoined all persuasion tending toward a breach of those contracts. It held both contracts valid without comment upon the law involved in the case. That court also granted a sweeping injunction against the secondary boycott.